

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

STEPHEN MATHEW, derivatively on behalf)
of 22ND CENTURY GROUP, INC.,)

Plaintiff,)

vs.)

HENRY SICIGNANO III, JOHN T.)
BRODFUEHRER, RICHARD M. SANDERS,)
JOSEPH A. DUNN, JAMES W. CORNELL,)
and NORA B. SULLIVAN,)

Defendants.)

and)

22ND CENTURY GROUP, INC.,)

Nominal Defendant.)

Case No.: 19-cv-479

From the Supreme Court of the State
of New York, County of Erie, Index
No. 801786/2019

STIPULATED NOTICE OF REMOVAL

Defendants Henry Sicignano III, John T. Brodfuehrer, Richard M. Sanders, Joseph A. Dunn, James W. Cornell, and Nora B. Sullivan (collectively, the “Individual Defendants,” and together with 22nd Century, the “Defendants”), with the agreement and stipulation of Plaintiff Stephen Mathew (“Plaintiff”), hereby remove the above-captioned action from the Supreme Court of the State of New York, County of Erie, to the United States District Court for the Western District of New York, Buffalo Division, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. In support of removal, Plaintiff and Defendants (together, the “Parties”) state as follows:

BACKGROUND

1. Plaintiff filed the Complaint in the Supreme Court of the State of New York, County of Erie, on February 11, 2019, styled as *Stephen Mathew v. Henry Sicignano III et al.* (the

“State Court Action”). The action was designated Index No. 801786/2019. A true and correct copy of the Summons and Complaint is attached hereto as Exhibit 1.¹

2. 22nd Century was served with the Summons and Complaint on February 13, 2019. *See* Exhibit 2.

3. Pursuant to the Waiver of Service and Stipulation Regarding the Time for Defendants to Answer, Move, or Otherwise Respond to the Complaint filed by the Individual Defendants on March 1, 2019, attached hereto as Exhibit 3, the Individual Defendants accepted service of the Summons and Complaint on February 27, 2019.

4. The Complaint does not identify the residency of the Plaintiff or otherwise identify grounds for jurisdiction pursuant to 28 U.S.C. § 1332.

5. Counsel for Plaintiff first identified Plaintiff’s South Dakota residency on a telephone call with counsel for Defendants on April 2, 2019.

6. This removal is timely filed within thirty days of Defendants’ discovery of basis of diversity jurisdiction over this case. *See* 28 U.S.C. § 1446(b).

7. A case related to the State Court Action, a derivative action captioned *Klein, Derivatively on Behalf of 22nd Century Group, Inc. v. Sicignano et al.*, Civ. No. 19-748 (the “Klein Derivative Action”), was filed in U.S. District Court for the Eastern District of New York. On April 11, 2019, the Eastern District of New York ordered that action stayed and transferred it to the Western District of New York.

8. The Parties in the State Court Action agree that it should be removed, stayed, and consolidated with the Klein Derivative Action, and intend to file a stipulation and proposed order

¹ Pursuant to W.D.N.Y. Rule 81(a)(3) and 28 U.S.C. § 1446(a), each of the documents filed in the State Court Action are attached hereto as Exhibits 1-6 and identified in the index attached hereto as Exhibit A.

in this Court to stay the State Court Action, and to move to consolidate the State Court Action with the Klein Derivative Action.

GROUND FOR REMOVAL

9. Removal is proper pursuant to 28 U.S.C. § 1441 because this Court has original jurisdiction over this dispute under 28 U.S.C. § 1332. Section 1332 of Title 28 of the United States Code confers jurisdiction over civil actions in which the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different States.

10. Plaintiff is a resident of the State of South Dakota.

11. 22nd Century is a Nevada corporation with its principal place of business at 8560 Main Street, Williamsville, New York 14221.

12. Henry Sicignano III, John T. Brodfuehrer, Richard M. Sanders, Joseph A. Dunn, James W. Cornell, and Nora B. Sullivan are all residents of the State of New York.

13. Plaintiff alleges that “[a]s a direct and proximate result of the Individual Defendants’ conduct, 22nd Century has lost and expended, and will lose and expend, many millions of dollars,” and further alleges that 22nd Century is entitled to damages from the Individual Defendants sustained as a result of the violations of each of the Individual Defendants. Complaint at 30, 42. Accordingly, the Complaint alleges an amount in controversy that exceeds this Court’s jurisdictional threshold of \$75,0000, exclusive of interest and costs, under 28 U.S.C. § 1332.

14. Plaintiff jointly seeks the removal of this action and waives any objection to such removal, including any objection pursuant to 28 U.S.C. § 1441(b)(2).

15. Pursuant to 28 U.S.C. § 1446(d) and W.D.N.Y. R. 81(a)(4), the undersigned counsel for Defendants certifies that a Notice of Filing of Notice of Removal, along with a copy of this Notice of Removal, will be promptly filed with the clerk of the New York State Supreme

Court, County of Erie, and Defendants are providing this Notice of Removal and its attachments to all adverse parties.

16. Nothing in this Notice of Removal shall be interpreted as a waiver or relinquishment of the Parties' right to assert any defense or affirmative matter, including without limitation any defense available under Fed. R. Civ. P. 12, or any other procedural or substantive defense available under State or Federal law.

17. The Parties reserve the right to amend or supplement this Notice of Removal.

WHEREFORE, the Parties give notice that this matter is removed to the United States District Court for the Western District of New York, Buffalo Division, and request that this Court retain jurisdiction for further proceedings.

Dated: April 12, 2019

Respectfully submitted,

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Dated: April 12, 2019

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